TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 229

CONTINENTAL GRAIN COMPANY, PETITIONER,

vs.

BARGE FBL-585, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 21, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 17499

CONTINENTAL GRAIN COMPANY, Appellant,

versus

FEDERAL BARGE LINES, INC., Appellee.

TRANSCRIPT OF RECORD—Filed December 18, 1958

[File endorsement omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

No. 3656 Admiralty

CONTINENTAL GRAIN COMPANY

versus

FEDERAL BARGE LINES, INC.

APPEARANCES:

Deutsch, Kerrigan & Stiles, Malcolm W. Monroe, Esq., Proctors for Libellant-Appellant.

Lemle & Kelleher, Charles Kohlmeyer, Jr., Esq., Charles Lugenbuhl, Esq., Proctors for Respondent-Appellee.

Appeal from the District Court of the United States for the Eastern District of Louisiana, to the United States

Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 12th day of November, 1958, at the City of New Orleans, La.

[fol. 2]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed July 2, 1958

The libel of Continental Grain Company against Federal Barge Lines, Inc. and Barge FBL-585, in a cause of cargo damage, civil and maritime, with respect represents:

For a First Cause of Action

First

At all material times, libelant was, and now is, a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business in New York, New York.

Second

At all material times, respondent was, and now is, a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business in the City of New Orleans, owning and/or operating various vessels, including Barge FBL-585, and was, and now is, engaged in business as a common carrier of merchandise by water for hire.

Third

At all material times, Barge FBL-585 was a vessel engaged in the common carriage of goods by water for hire, and is now, or will be during the pendency of process herein, within the jurisdiction of this court.

Fourth

Barge FBL-585 built in 1926, is a steel, house barge, with [fol. 3] a molded length of 230 feet and breadth of 45 feet. She has eight cargo compartments in her hull, four cargo compartments in her house, and has a cargo capacity of

2026 net tons. Her draft, when light, is two feet one inch, and when loaded to capacity, is nine feet.

Fifth

On the morning of November 6, 1957, the Barge FBL-585 which was then light, was lying alongside libelant's wharf at its grain elevator, located on Wolf River in Memphis, Tennessee.

Sixth

The FBL-585 had previously been spotted at the wharf by respondent for the purpose of taking on a cargo of soy-beans, to be loaded by libelant, and to be carried by respondent and the Barge FBL-585 to New Orleans, and there to be delivered in like good order and condition as when received, all in consideration of a certain Column "A" freight rate to be charged thereon.

Seventh

On November 6, 1957, libelant safely and properly loaded aboard said Barge FBL-585 a total of approximately 1320 tons of soy-beans, all in good order and condition.

Eighth

At about 10 PM on said date, libelant discontinued loading operations for the night, intending to complete the load-
[fol. 4] ing of the FBL-585 the following morning.

Ninth

At about 6:50 AM, November 7, 1957, it was discovered that the barge had sunk in Wolf River alongside libelant's wharf, thereby causing severe water-damage to said cargo of soy-beans.

Tenth

Said sinking of the Barge FBL-585 and the resulting damage to her cargo, was caused, not by any negligence on the part of libelant, but, to the contrary, by the unsea-

worthiness of the FBL-585 in the following respects, among others:

1—Her headlog plate, lower knuckle and gunwale bar were heavily distorted, with fractures at nearly every diaphragm plate;

2—The shell plate of her No. 1 starboard wing-tank was fractured;

3—All manhole plates were without gaskets or holding-down gear, some were adrift from their hinges, and none was water-tight.

For a Second Cause of Action

Eleventh

The facts contained in Articles First through Ninth above are reaverred.

Twelfth

Respondent and the Barge FBL-585 received the afore-[fol. 5] said cargo of soy-beans aboard said barge for carriage to New Orleans under the terms and conditions of respondent's customary form of "bargeload traffic" bill of lading, which respondent intended to issue therefor.

Thirteenth

Under the provisions of said bill of lading, respondent assumed the liability of insurer for all damage to, or loss of, the aforesaid cargo which was safely loaded aboard the FBL-585 howsoever said damage or loss occurred.

As to Both Causes of Action

Fourteenth

By reason of the premises, libelant has sustained damages in the sum of $90,000 as nearly as the same can now be estimated, no part of which has been paid although duly demanded.

Fifteenth

At all material times, libelant was the owner of the merchandise described above, and is entitled to maintain this action.

Wherefore, libelant prays that:

(1) Process issue against respondent, citing it to appear and answer this libel;

(2) Process issue against the Barge FBL-585 and that all persons claiming any interest in said vessel be cited to appear and answer this libel;

[fol. 6] (3) The court decree that respondent pay to libelant the damages suffered by it, together with interest thereon and its costs and disbursements;

(4) The Barge FBL-585 be condemned and sold to pay the amount due libelant herein; and

(5) Libelant have such other and further relief as justice may require.

Deutsch, Kerrigan & Stiles, 1800 Hibernia Bank Building, New Orleans, Proctors for Libelant.

Malcolm W. Monroe, Advocate.

June 26, 1958.

Duly sworn to by Theodore Ness, jurat omitted in printing.

[fol. 7]

In United States District Court

Stipulation for Costs—Filed July 2, 1958

Know All Men by These Presents that we, Continental Grain Company, as principal, and The Fidelity & Casualty Company of New York, as surety, are bound to the Barge FBL-585 in the sum of two hundred fifty ($250) dollars, to the payment whereof we bind ourselves, our successors and assigns, jointly and severally by these presents:

Whereas Continental Grain Company is about to file its libel in rem against the Barge FBL-585 in the United States District Court in and for the Eastern District of Louisiana, in a cause of cargo damage, civil and maritime;

Now Therefore, the condition of this obligation is such that if said Continental Grain Company shall prosecute its claim as aforesaid, and shall abide all orders, interlocutory and final, of the aforesaid Court, and pay all costs and expenses, if such shall be awarded against it by final decree of the aforesaid court, then this obligation shall be void; otherwise to remain in force.

Executed at New Orleans, on July 1st, 1958.

[fol. 8] Continental Grain Company, By: Deutsch, Kerrigan & Stiles, Proctors.

The Fidelity & Casualty Company of New York, By: A. Leonard Robinett, Attorney-in-fact.

IN UNITED STATES DISTRICT COURT

CLAIM—Filed July 29, 1958

Comes now Federal Barge Lines, Inc., through its proctors of record, Lemle & Kelleher, and shows that it is the sole and only owner of the Barge FBL 585, proceeded against herein, and claims the said barge as owner and prays that it be permitted to defend according to law.

New Orleans, Louisiana, July 28, 1958.

Charles E. Lugenbuhl, Proctor for Federal Barge Lines, Inc.

[fol. 9] *Duly sworn to by Charles E. Lugenbuhl, jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

ANSWER—Filed September 18, 1958

Now comes Federal Barge Lines Inc. and for answer to the libel of Continental Grain Company with respect represents that:

1.

The allegations of paragraph 1 are admitted.

2.

The allegations of paragraph 2 are admitted, except that it denies that its principal office is in New Orleans and avers that such principal office is in St. Louis, Missouri.

3.

The allegations of paragraph 3 are admitted except that respondent shows that FBL 585 is a dumb barge.

4.

The allegations of paragraph 4 are admitted.

[fol. 10]

5.

The allegations of paragraph 5 are admitted.

6.

The allegations of paragraph 6 are admitted except that respondent shows that Barge FBL 585 had been spotted at the Elevator of libelant for the purpose of discharging a cargo of grain, which discharge had been completed prior to November 6, 1957.

7.

The allegations of paragraph 7 are denied.

8.

For lack of sufficient information to justify a belief, respondent denies the allegations of paragraph 8.

9.

The allegations of paragraph 9 are admitted.

10.

The allegations of paragraph 10 are denied.

11.

Paragraph 11 of the libel requires no answer.

12.

The allegations of paragraph 12 are denied, except that respondent admits that it was intended that the form of bill of lading set forth in respondent's tariff covering movements of bulk grain from Memphis to New Orleans on "A" rates was to be issued.

[fol. 11]

13.

The allegations of paragraph 13 are denied.

14.

For lack of sufficient information to justify a belief, the allegations of paragraph 14 are denied.

15.

The allegations of paragraph 15 are admitted.

16.

Further answering the libel respondent shows that its Barge FBL 585 was at all times referred to in the libel sound, staunch, strong and seaworthy in all respects and was fit and suitable for the carriage of a cargo of soybeans from Memphis to New Orleans; that libelant, its agents, servants and employees caused the barge to be improperly loaded or misloaded on or about November 6/7, 1957 to such an extent as to force the bow of the barge down to the bottom of the berth in which she was then lying; that the cargo which libelant claims was lost by virtue of the occur-

rence was in fact lost or damaged by reason of the fault, neglect and lack of care of libelant, its agents, servants and employees in loading and trimming the cargo and in overloading or failing properly to load the said barge so as to cause it to go down by the head.

17.

Further answering the said libel respondent shows that [fol. 12] it has heretofore filed a suit in the Circuit Court of Shelby County, Tennessee against libelant for the amount of $75,000.00, for damages sustained by its barge in the incident referred to in the libel. Respondent reserves all the rights which it may have to urge in its said cause of action as a counter-claim herein in the event that such claim be considered as a mandatory counter-claim or cross libel under the circumstances set forth.

Wherefore, respondent prays that libelant's libel may be dismissed at its cost; and for such other and further relief as may be meet and proper in the premises and this court competent to grant.

Lemle & Kelleher, By Charles Kohlmeyer, Jr., 1836 National Bank of Commerce Bldg., New Orleans, Louisiana, Proctors for Respondent.

[fol. 13] *Duly sworn to by Charles Kohlmeyer, Jr., jurat omitted in printing.*

Certificate of service (omitted in printing).

[fol. 14]

IN UNITED STATES DISTRICT COURT

MOTION TO TRANSFER CASE TO WESTERN DISTRICT OF TENNESSEE—Filed October 13, 1958

Now comes Federal Barge Lines Inc., and move the Court for an order transferring this action to the United States District Court for the Western District of Tennessee, Western Division, on the ground that such transfer is necessary for the convenience of the parties and witnesses and in the

interest of justice as will appear from the affidavit attached hereto and made part hereof.

Charles Kohlmeyer, Jr., 1836 National Bank of Commerce Building, New Orleans, La.

Of Counsel, Lemle & Kelleher.

Burch, Porter, Johnson & Brown, 128 North Court Avenue, Memphis, Tennessee, Proctors for Respondent.

AFFIDAVIT OF CHARLES KOHLMEYER, JR.

State of Louisiana
Parish of Orleans

Before me, the undersigned authority, personally came and appeared Charles Kohlmeyer, Jr. who, being first daly sworn, did depose and say:

I am a member of the firm of Lemle & Kelleher, counsel [fol. 15] for Federal Barge Lines, Inc. I personally investigated the facts surrounding the claim which is the basis of this libel and am the individual member of my firm charged with primary responsibility for this litigation.

On June 27, 1958, there was filed in the Circuit Court of Shelby County, Tennessee a suit at law wherein Federal Barge Lines Inc. sought a recovery of $75,000.00 from Continental Grain Company for damages suffered by it in the sinking of Barge FBL 585. It was alleged in the declaration that the barge was sunk through the negligence or fault of Continental Grain Company employees.

Sometime thereafter, on July 15, 1958, Continental Grain Company appeared and caused the cause to be removed to the United States District Court for the Western District of Tennessee, Memphis Division. Federal Barge Lines appeared and filed a motion to remand. Argument on the foregoing motion was heard before Judge J. D. Martin of the Court of Appeals for the Sixth Circuit, sitting by designation as District Judge, on September 12, 1958. After hearing argument of counsel, the Court ordered that the motion to remand be denied and the cause was retained in the United States District Court for the Western District of Tennessee, Memphis Division, Docket No. 3487. Trial on

the merits has been fixed before Judge Martin, sitting by designation, on November 19, 1958.

On July 2, 1958, Continental Grain Company filed this [fol. 16] suit against Federal Barge Lines, Inc. in this Honorable Court. An answer has been filed, and a motion to transfer the cause to the United States District Court for the Western District of Tennessee, Memphis Division, on the grounds of *forum non conveniens* is now before the Court.

The parties to this litigation are identical, the subject matter of each case is the incident wherein the FBL 585 sunk at Continental Grain Company's dock in Memphis; on the one hand, Federal Barge Lines in seeking recovery from Continental Grain for the cost of salving and repainting the barge, charging negligence on the part of the Continental Grain, in overloading or improperly loading the barge; on the other hand, Continental is seeking damages from Federal Barge Lines for the loss of its cargo of soybeans laden in the barge when it sunk, charging unseaworthiness of the barge.

Federal Barge Lines Inc. is a common carrier by water, certificated under Part III of Interstate Commerce Act. It is a Delaware corporation having its principal offices in St. Louis, Missouri. It has freight soliciting representatives in various places along the Mississippi River, including Memphis and New Orleans.

No witnesses involved in this case live in or about the vicinity of New Orleans other than the hull and cargo surveyors who were consulted. There were three sets of hull surveyors involved, only one of whom lives in New Orleans, [fol. 17] the other two working out of St. Louis and Memphis, respectively. All fact witnesses relative to the loading (there apparently were six) are employees of Continental Grain Company and are residents of and domiciled in Memphis. Continental Grain elevator and office or administrative personnel who may have to testify are located in Memphis. Other fact witnesses who may be called upon to testify as to the level of the river, weather conditions and the ordering or placing of the barge live in Memphis. No witnesses live in New Orleans other than the surveyors,

and New Orleans has no connection with the litigation other than the fact that the barge may physically be located here.

The foregoing facts are within affiant's own knowledge or have been ascertained by close investigation and inquiry and are believed to be accurate.

Charles E. Kohlmeyer, Jr.

Sworn to and subscribed before me this 13th day of October, 1958.

William Stern, Jr., Notary Public.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MALCOLM W. MONROE—Filed October 14, 1958

State of Louisiana
Parish of Orleans:

Before me, the undersigned authority, personally ap- [fol. 18] peared Malcolm W. Monroe, who being first duly sworn, deposed that;

He is a member of the firm of Deutsch, Kerrigan, & Stiles proctors for libelant herein; he personally investigated the facts surrounding libelant's claim; and on the basis of that investigation, and the data and documents included in the file which is in the custody of the firm as proctors for libelant, he makes this affidavit as to the following facts:

Barge FBL-585 was raised and floated approximately one week after she had sunk at Continental Grain Company's elevator at Memphis. Shortly thereafter, she was moved to the port of New Orleans, where she was tied up at Federal Barge Line's upper fleet in the Mississippi River at or near the foot of Carrollton Avenue. She has remained there since, having been retired from active service by Federal Barge Lines.

Affiant has been informed by representatives of Federal Barge Lines that the FBL-585 is considered to have scrap value only, and that she will not be moved, as a vessel, from this port. The barge has accordingly never returned, and will never return, to the Western District of Tennessee. To

the contrary, the barge is within this district, where she undoubtedly will be available for viewing and inspection by this court during trial, should the court so desire. She was at the time of filing of the libel herein, and still is, subject to the jurisdiction of this court only.

On November 14, 1957, the FBL-585 was surveyed while [fol. 19] afloat at Memphis by the following representatives of the interested parties.

1—Mr. E. M. Merrill, of Merrill Marine Service, of St. Louis, Missouri, acting for underwriters of Federal Barge Lines;

2—Mr. Fred Hunt, of Messrs. Hunt, Leithner & Company, of Chicago, Illinois, representing Inland Survey Bureau, Inc., of New York City, acting for the liability underwriters of Continental Grain Company;

3—Mr. Stanley M. Lecourt, marine engineer and surveyor, of New Orleans, acting for cargo underwriters of Continental Grain Company.

In addition, the cargo was surveyed and salvaged by Messrs. John A. McKee & Company, of New Orleans, acting for Continental Grain Company and its cargo underwriters.

On or about August 7, 1958, the FBL-585 was again surveyed, while afloat at Federal Barge Lines' fleet at this port, by Mr. William R. Bagger, of New York City, acting for the liability underwriters of Continental Grain Company.

Affiant knows of no hull surveyor who, as stated in the affidavit of Mr. Charles Kohlmeyer, Jr., works "out of Memphis" but as shown hereinabove, all surveyors reside outside the Western District of Tennessee, and the cargo surveyors and one of the hull surveyors reside within the [fol. 20] Eastern District of Louisiana.

Prior to the filing of either the action in the state court at Memphis ("Federal Barge Lines, Inc. vs. Continental Grain Company"), or the instant one in this district, proctors for, and other representatives of, the interested parties met in New York City to discuss possible amicable adjustment of the various claims which arose as a result of the

sinking of the FBL-585. At this meeting, it was agreed that the depositions of the employees of Continental Grain Company who had knowledge of the facts surrounding the loading of the barge, would be taken prior to the filing of any action by any party, the object being not only to have a full disclosure of the facts with the view of facilitating possible settlement of the claims, but also to preserve the testimony of the witnesses for use in any action which might be filed in any court by the parties.

Pursuant to this agreement, on May 14, 1958, the depositions of the following employees of Continental Grain Company were taken at Memphis:

1—Harry Albright, elevator superintendent, who was on duty during the day shift of November 6 and 7, 1957;

2—Roosevelt Sales, laborer, who was in direct charge of loading of the barge during the day shift of November 6, 1957;

3—Andrew C. Phelan, elevator foreman, who was on duty during the night shift of November 6, 1957;

[fol. 21] 4—Clarence Johnson, laborer, who was in direct charge of loading of the barge during the night shift of November 6, 1957;

5—Jack Gordon, vice-president in charge of the Memphis office.

To the best of affiant's present knowledge, information and belief, these are the only employees of Continental Grain Company who have knowledge of any pertinent facts as to the loading and sinking of the FBL-585.

The depositions were attended by affiant, acting for Continental's cargo underwriters; Mr. George B. Warburton, acting for Continental's liability underwriters; and Mr. Charles Kohlmeyer, Jr., acting for Federal Barge Lines and its underwriters.

Thereafter, when it became apparent that Federal Barge Lines was not willing to consider amicable settlement of the claims, this action was filed on July 2, 1958, against the FBL-585, *in rem*, and Federal Barge Lines, Inc., *in per-*

sonam. Later on the same day, affiant learned for the first time that Federal Barge Lines had filed suit against Continental Grain Company in the state court at Memphis, which suit is being defended by Continental's liability underwriters represented by Messrs. Hill, Rivkins, Middleton, Louis & Warburton of New York City.

On July 28, 1958, Federal Barge Lines, Inc. appeared [fol. 22] herein and filed claim to the FBL-585; and also issued its letter of undertaking, dated July 23, 1958, a photostat of which is annexed hereto and made part hereof. On or about September 15, 1958, respondent filed its answer to the libel.

Affiant, on behalf of libelant, contemplates taking additional depositions of witnesses other than residents of Memphis, and it presently appears that this case will not be ready for trial on November 19, 1958, even should it be transferred to Memphis. Proctor for claimant-respondent has advised affiant that Federal Barge Lines intends to give notice of the taking of a deposition of a witness at Kansas City, Missouri, for use in both this proceeding and the one now pending in the Federal Court for the Western District of Tennessee.

Malcolm W. Monroe

Sworn to and subscribed before me this 14th day of October, 1958.

Julian H. Good, Notary Public.

IN UNITED STATES DISTRICT COURT

LETTER FROM FEDERAL BARGE LINES, INC.
TO CONTINENTAL GRAIN COMPANY
DATED JULY 23, 1958

FEDERAL BARGE LINES
Telephone: Vernon 2-4000

611 East Marceau St.
St. Louis 11, Mo.

Continental Grain Company
c/o Messrs. Deutsch, Kerrigan & Stiles
1800 Hibernia Bank Building
New Orleans, Louisiana

[fol. 23] Re: Continental Grain Company
vs Federal Barge Lines, Inc.
and Barge FBL 585
No. 3656 In Adm. E. D. La.

Gentlemen:

In consideration of your not having seized, under the *in rem* process which has been issued in the captioned action, our Barge FBL 585, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of the United States District Court for the Eastern District of Louisiana; and in further consideration of our not being required to post the usual bond for the release of that vessel.

We agree that we shall, within the delays allowed by law and/or the rules of court, file claim to Barge FBL 585 and pleadings in the above entitled and numbered action, and that, vessel lost or not lost, we shall pay any final decree which may be rendered against said vessel in said proceeding.

It is the intent of this undertaking that the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in*

rem process, and released by the filing of claim and release bond we, as claimant, reserving in behalf of the vessel all other objections and defenses otherwise available except those which might be predicated upon the fact that the vessel was not actually so seized.

[fol. 24] Very truly yours, Federal Barge Lines, Inc.

By Noble C. Parsonage, Vice President-Treasurer.

IN UNITED STATES DISTRICT COURT

STIPULATION

In Re: Sinking of Barge FBL 585 at Memphis, on November 6-7, 1957.

Stipulation

It is stipulated by and between Continental Grain Company and its underwriters, and the Federal Barge Line, Inc., and its underwriters, that the testimony taken may be used in any litigation involving any of the parties concerning the above occurrence, in any United States Court where jurisdiction may exist, to the same extent as if such litigation were now pending, and the witnesses produced were produced by the Continental Grain Company and its underwriters.

It is further stipulated that the depositions are taken as if the Federal Laws of Civil Procedure were applicable, except that all objections, except as to the form of question, are reserved to the parties, and signing, sealing and filing are waived.

The cost of the taking of the depositions, including one original and one copy to each of the three interested parties, will be a taxable cost if litigation ensues, otherwise, the cost [fol. 25] will be borne one-third for each interested party.

In United States District Court

Minute Entry of Hearing on Motion of Respondent to Transfer Case to Western District of Tennessee and Order Granting Same—October 16, 1958

Wright, J.:

This matter came on for hearing on respondent's motion to transfer this case to the United States District Court for the Western District of Tennessee under 28 U.S.C. §1404 (a).

Present:

Malcolm Monroe, Esq., Proctor for Libellant.

Charles Kohlmeyer, Jr., Esq., Proctor for Respondent.

The Court, having heard the argument of counsel and studied the briefs submitted in support thereof, is now ready to rule.

It Is Ordered that this case be, and the same is hereby transferred to the United States Court for the Western District of Tennessee.

It Is Certified that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

Per Curiam

The damage to the cargo in suit occurred in Memphis [fol. 26] when the barge into which it was being loaded at libellant's grain elevator sank. The barge, owned by respondent herein, was also damaged. That damage is the subject of a suit between these parties now pending in the Western District of Tennessee. Most of the witnesses to the sinking reside in Memphis. Although the case pending in Memphis will be tried to a jury, the issue therein, that is, the cause of the casualty, is precisely the issue in the case at bar. The convenience of the great majority of witnesses in this

case dictates that this case be tried in Memphis. The efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim for hull damage, both claims being between the same parties, and relate to the same incident.[1]

The libel is in rem as to the Barge FBL-585. While this libel could have been originally brought in the Western District of Tennessee against the respondent, Federal Barge Lines, the owner of the barge, the libel as to the barge itself would ordinarily be restricted to the place where the barge [fol. 27] is located at the time the libel is filed.[2] At that time, and now, the barge is located in this district. However, since the barge was neither seized by the Marshal nor bonded by respondent, libellant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by, for the reasons above stated, transferring this case to the Western District of Tennessee. Since this order to transfer does involve a serious question of law under 28 U.S.C. §1404 (a), that is, the right to transfer the case as against the barge to the Western District of Tennessee,[3] this Court has certified this order for appeal under 28 U.S.C. §1292 (b).

---

[1] Since the suit in the Western District of Tennessee was filed before the one here, it may be that the defendant there, the libellant here, is required to counterclaim in that action for its cargo damage. See Rule 13 (2) Fed. R. Civ. P. Moreover, since the case there is to be tried on the merits on November 19, 1958, a final judgment rendered therein may bar further prosecution of the suit here under the principle of collateral estoppel. See Restatement, Judgments §58 c.

[2] Clinton Foods v. United States, 4 Cir., 188 F. 2d 289; Broussard v. The Jersbek, 140 F. Supp. 851; New Jersey Barging Corp. v. T. A. D. Jones & Company, 135 F. Supp. 97; United States v. 11 Cases, etc., 94 F. Supp. 925.

[3] See Deepwater Exploration Company, et al v. Andrew Weir Insurance Co., Ltd. et al, D.C. ED. La., October 3, 1958, F. Supp. ; and cases cited in Note 2.

IN UNITED STATES DISTRICT COURT

MOTION FOR STAY OF ORDER TO TRANSFER—
Filed October 17, 1958

On motion of libelant, and on suggesting to the court that libelant intends to apply to the Court of Appeals for the Fifth Circuit, under the provisions of the Interlocutory Appeals Act (28 USC 1292 (b)), for allowance of an appeal [fol. 28] from the order of this court entered October 16, 1958, transferring this proceeding to the United States District Court for the Western District of Tennessee, which order this Court certified that a controlling question of law as to which there is substantial ground for difference of opinion is involved, and that an immediate appeal from this order may materially advance the ultimate termination of this litigation; and

On further suggesting to the court that libelant requires ten days within which to prepare and have printed the necessary application for allowance of appeal and supporting documents; and that it therefore desires a stay of the aforesaid order of this court pending the timely filing of the application for appeal and final action by the Court of Appeals for the Fifth Circuit on the application, and, if granted, on the appeal:

It Is Ordered that execution of this court's order dated October 16, 1958, transferring this proceeding to the United States District Court for the Western District of Tennessee be, and it hereby is, stayed for a period of ten days from and after the entry of this present order pending timely filing with the Court of Appeals for the Fifth Circuit of an application for allowance of an appeal from the aforesaid order dated October 16, 1958; and on timely filing of such application, this stay shall continue and remain in effect until the action of the Court of Appeals for the Fifth Circuit on such application, and, if granted on the appeal, shall [fol. 29] have become final.

New Orleans, October 20th, 1958.

J. Skelly Wright, United States Judge.

Deutsch, Kerrigan & Stiles, 1800 Hibernia Bank Building, New Orleans, Proctors for libelant.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 12, 1958

Sirs:

Please take notice that, pursuant to the order of the United States Court of Appeals for the Fifth Circuit, entered on November 10, 1958, granting libelant permission, under the Interlocutory Appeals Act (28 USC 1292 (b)), to take an appeal from the interlocutory order of this court, dated October 16, 1958, transferring this action to the United States District Court for the Western District of Tennessee, libelant hereby appeals to the United States Court of Appeals for the Fifth Circuit from said interlocutory order.

New Orleans, November 11, 1958.

Deutsch, Kerrigan & Stiles, Proctors for Libelant-Appellant.

Malcolm W. Monroe, Advocate.

To: Honorable A. Dalham O'Brien, Clerk of Court.
[fol. 30] Charles Kohlmeyer, Jr. Esq., Messrs. Lemle & Kelleher, National Bank of Commerce Building, New Orleans, Proctors for Claimant-Respondent.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed November 12, 1958

Libelant hereby assigns error in the order of this court entered herein on October 16, 1958, transferring this action to the United States District Court for the Western District of Tennessee, as follows:

The court erred in holding that an admiralty action in rem may be transferred, under 28 USC 1404 (a), to a district other than that "where it might have been brought" because the res was not located in that district at the time of filing of either the libel or the motion to transfer.

Malcolm W. Monroe of Deutsch, Kerrigan & Stiles, Proctors for Libelant-Appellant.

New Orleans, November 11, 1958.

IN UNITED STATES DISTRICT COURT

PRAECIPE—Filed November 12, 1958

To: Honorable A. Dallam O'Brien, Clerk, United States District Court, Eastern District of Louisiana.

Sir:

[fol. 31] Libelant hereby requests that the record on appeal in this action include the following:

1. Libel.

2. Stipulation for costs.

3. Claim of Federal Barge Lines, Inc. to Barge FBL-585.

4. Answer of claimant-respondent.

5. Motion to transfer cause.

6. Affidavit of Charles Kohlmeyer, Jr. in support of motion.

7. Affidavit of Malcolm W. Monroe in opposition to motion, including:

a. Letter of undertaking, dated July 23, 1958, of Federal Barge Lines, Inc., annexed thereto.

8. Stipulation of the parties, dated May 14, 1958, for taking and using depositions of Harry Albright, Roosevelt Sales, Andrew C. Phelan, Clarence Johnson and Jack Gordon, which is included in the transcript of said depositions taken at Memphis on said date.

9. Minute entry and opinion *per curiam*, dated October 16, 1958.

10. Motion and order, dated October 20, 1958, staying order to transfer this cause.

11. Notice of appeal.

12. Assignment of errors.

13. This praecipe.

Respectfully, Malcolm W. Monroe of Deutsch, Kerrigan & Stiles, Proctors for Libelant-Appellant.

New Orleans, November 11, 1958.

[fol. 32] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 33]

IN UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 17499

CONTINENTAL GRAIN COMPANY, Petitioner-Libelant Below

versus

FEDERAL BARGE LINES, INC., Respondent-Claimant Below

and

BARGE FBL-585

PETITION FOR ALLOWANCE OF APPEAL FROM INTERLOCUTORY ORDER—filed November 10, 1958

Malcolm W. Monroe, Proctor for Petitioner.

Deutsch, Kerrigan & Stiles, Eberhard P. Deutsch, Of Counsel.

[File endorsement omitted]

[fol. 34]

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IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17499.

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL FROM INTERLOCUTORY ORDER—filed November 10, 1958

Pursuant to the provisions of the Interlocutory Appeals Act of September 2, 1958,[1] petitioner prays for allowance of an appeal from the order entered by the United States District Court for the Eastern District of Louisiana, on Octo-
[fol. 38] ber 16, 1958, transferring this admiralty action

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[1] 72 Stat. 1770, 28 USC 1292(b); reprinted in Appendix A. Under the Act, the remedy afforded an aggrieved party is to file with the Court of Appeals a petition for allowance of an appeal, in much the same way as a petition for writ of certiorari is filed with the Supreme Court. See Hearings before Subcommittee No. 3 of the Committee of the Judiciary, House of Representatives, on H. R. 6238, at p. 18.

in rem and *in personam* to the United States District Court for the Western District of Tennessee.

In its order, the District Court certified that "a controlling question of law as to which there is substantial ground for difference of opinion" is involved, and that "an immediate appeal from this order may materially advance the ultimate termination of this litigation."

In support of this petition for allowance of appeal, petitioner respectfully shows:

I

Question Presented

The controlling question of law presented for determination in this proceeding is:

> May an admiralty action *in rem* be transferred, under 28 USC 1404(a),[2] to a district other than that "where it might have been brought," because the *res* was not located in that district at the time of filing of either the libel or the motion to transfer?

When the case at bar was instituted by libel *in rem*, the vessel was not actually seized physically, but proctors for the owner appeared voluntarily and gave a letter of undertaking in lieu of a release bond—a customary procedure for the convenience of all concerned.

[fol. 39] The district judge conceded, of course, that a libel *in rem* may be brought only in the district in which the vessel is located when the libel is filed.

But the court held that because the vessel had not actually been seized physically by the marshal under formal process, and bonded, the action *in rem* could be transferred to a district in which the proceeding could not have been instituted originally.

The parties had stipulated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in*

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[2] Reprinted in Appendix A.

rem process, and released by the filing of claim and release bond."

Thus, implicit, if not expressed, in the district court's affirmative answer to the question presented in this case, is its holding that, in all actions *in rem*, vessels must be seized physically by the marshal and bonded, under formal process; and that a libelant and vessel-owner may not effectively and without prejudice, enter into a stipulation for release before seizure.

The district court, recognizing that there was substantial ground for an opinion different from its own, and that an immediate appeal may materially advance the ultimate termination of this litigation, stayed its order pending action by this court on this petition.

[fol. 40]

II

Jurisdiction and Opinion Below

Jurisdiction of this court is invoked under 28 USC 1292 (b).

The district court rendered no formal written opinion, but with its order of October 16, 1958, made a *per curiam* comment included among the relevant portions of the record printed herewith as Appendix B.

III

Summary Statement of the Matter Involved

The proceeding at bar was instituted on July 2, 1958, through libel in admiralty by the owner (petitioner) of cargo on a barge which had sunk in Wolf River at Memphis. The action is *in rem* against the barge, and *in personam* against the owner of the barge.

Shortly after her sinking, the barge was raised and moved to the port of New Orleans, where she remains.

Thus, at the time of the filing of the libel and of the motion to transfer, the vessel was, and still is, within the Eastern District of Louisiana, and subject to jurisdiction *in rem* only within that district.

After the libel was filed, the owner of the barge issued to petitioner its letter of undertaking, "in consideration of [fol. 41] (petitioner) not having seized, under the *in rem* process which has been issued in the captioned action, our Barge FBL-585, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of, the United States District Court for the Eastern District of Louisiana; and in further consideration of our not being required to post the usual bond for the release of that vessel," the owner agreed that it would "file claim to Barge FBL-585, and pleadings," and "that, vessel lost or not lost, (it would) pay any final decree which may be rendered against said vessel in said proceeding."

The undertaking further stipulated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond."

In due course, the barge-owner appeared in the proceeding and filed claim. Thereafter it filed its answer to the libel, in which it admitted that the barge "is now, or will be during the pendency of process herein, within the jurisdiction of this court."

Next, claimant-respondent (Federal Barge Lines) filed a motion to transfer this proceeding to the United States District Court for the Western District of Tennessee, where it had instituted a civil action against petitioner to recover [fol. 42] for the damage sustained by its barge as a result of the sinking.[1]

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[1] Appendix B, Item 2.

[2] That action is in fact being defended by the liability insurer of Continental Grain Company, the named defendant, which is represented by counsel other than proctors for petitioner herein, who have had no part in the defense of that action. Shortly after the libel in admiralty was filed in the Eastern District of Louisiana, proctors for petitioner learned for the first time of the filing of the action in Tennessee.

That action was originally filed at law in the state court of Tennessee, but was subsequently removed to the federal court which refused to remand it.

In granting the motion to transfer, the District Court held that "although the case pending in Memphis will be tried to a jury, the issue therein, that is, the cause of the casualty, is precisely the issue in the case at bar"; and that "the efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim for hull damage, both claims being [fol. 43] between the same parties, and relate to the same incident."[6]

With respect to the *in rem* action, the district court found that the *res* could only be found in this district, and

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[6] The District Court, apparently as justification for its order to transfer, suggests, in its *per curiam*, that "since [ ] suit in the Western District of Tennessee was filed before the one here, it may be that the defendant there, the libelant here, is required [under Rule 13(a), Fed. R. Civ. P.] to counterclaim in that action for its cargo damage." But the vessel was not a party to the Tennessee proceedings, and accordingly not subject to counterclaim at all. Further, Rule 82 of the Federal Rules of Civil Procedure provides that the rule shall not be construed to extend the jurisdiction of the district courts; and since the federal court, on its civil side, could not have jurisdiction over an admiralty action *in rem*, it is clear that defendant cannot be required to file such a "third-party" action *in rem* in the pending civil action in Tennessee, where the vessel is not to be found in any event. See Noma Electric Corp. v. Polaroid Corp., 2 FRD 454 (SD N.Y.-1942); Milburn v. Proctor Trust Co., 54 FS 989 (WD La.-1944).

[7] Appendix B, Item 5. The court also stated that the "convenience of the great majority of witnesses in this case dictates that this case be tried in Memphis." But the depositions of petitioner's employees, who are the only fact witnesses with respect to loading of the barge and events surrounding her sinking, were taken by agreement of the parties prior to commencement of any litigation with the understanding that those depositions could be used in such a proceeding as the instant one (see also stipulation in depositions, Appendix B, Item 1). Further, none of the four hull surveyors and one cargo surveyor is a resident of the Western District of Tennessee, two being residents of New Orleans, the others being residents of New York, Chicago and St. Louis. Claimant-respondent merely averred that "other fact witnesses who may be called upon to testify as to the level of the river, weather conditions and the ordering or placing of the barge live in Memphis."

was not subject to the jurisdiction of the court for the Western District of Tennessee.

But the court held that "since the barge was neither seized by the Marshal nor bonded by respondent, libelant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by, for the reasons above stated, transferring this case to the Western District of Tennessee."

The court concluded, however, that its "order to transfer does involve a serious question of law under 28 U.S.C. 1404(a), that is, the right to transfer the case as against [fol. 44] the barge to the Western District of Tennessee," and therefore "certified this order for appeal under 28 U.S.C. 1292(b)."

IV

Reasons Relied on for Allowance of an Appeal

The order of the District Court contravenes a fundamental premise for application of the *forum-non-conveniens* statute.[7] For "in all cases in which the doctrine of *forum non conveniens* comes into play it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."[8]

Under the specific provision of subsection (a) of Section 1404 of the Judicial Code, a court is empowered to transfer an action only to a district "where it might have been brought."[9]

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[7] 28 USC 1404(a).

[8] Gulf Oil Corporation v. Gilbert, 330 US 501, 506 (1947); followed in Wilson v. Seas Shipping Corp., 78 FS 464 (ED Pa.-1948); Neal v. Pennsylvania R. Co., 77 FS 423 (SD N.Y.-1948); Mazinski v. Dight, 99 FS 192 (WD Pa.-1951); Herzog v. Central Steel Tube Co., 98 FS 607 (SD Iowa-1951).

[9] This, of course, is not a case in which a defendant may consent to personal service, and waive objection to the venue of a district in which he is not subject to service. *Cf.* Ex parte Blaski, 245 F2d 737 (CA 5-1957).

And "it is well settled that a proceeding *in rem* against specific property is local in character and must be brought where the property is subject to seizure under process of [fol. 45] the court. Since the suit . . . could not have been brought in any other district than that in which (the property was) seized, it is clear that it may not be transferred from that district under the provisions of 28 USCA Sec. 1404(a)." [10]

The recent case of *Broussard* v. *The Jersbek* is strikingly similar to the instant one.[11]—In that case, a libel *in rem* against the *Jersbek* was filed in New York to recover for injuries sustained as a result of a collision between that vessel and a tug in the Houston Ship Channel.

Libelant had previously filed, in Texas, a libel *in rem* against the tug, claiming damages for the same injuries, but the *Jersbek* could not be found within that district.

Libelant moved to transfer the *in rem* action against the *Jersbek* to Texas, where the other action was then pending. It is obvious that the real object of that motion, as is true of the instant one, was to have the two actions, which arose out of the same incident, tried before the same court.

The reasoning of the district court in the instant case—that, since "the issue therein, that is, the cause of the casualty, is precisely the issue" in the other proceeding, [fol. 46] "the efficient administration of justice requires" that the two cases be tried by the same court—was unquestionably equally applicable in the *Jersbek* case.[12]

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[10] Clinton Foods, Inc. v. United States, 188 F2d 289, 292 (CA 4-1951). See also United States v. 11 Cases, More or Less, Ido-Pheno-Chon, 94 FS 925, 927 (D. Ore.-1950): "Title 28 U.S.C.A. Sec. 1404(a) gives power to transfer any civil action to any district where it might have been brought. This action could only have been brought in Oregon, because here alone was the res 'found'."

[11] 140 FS 851 (SD N.Y.-1956).

[12] In fact, in *Jersbek* the two actions could have been tried "by the same court," since they were both admiralty proceedings. That is not true of the instant case and the action pending in Tennessee, because the former is an admiralty proceeding to be tried by the judge, while the latter is a civil action to be tried by a jury.

But in the *Jersbek* case, the court denied the motion to transfer, holding that "an *in rem* action might be brought only in the district where the res is or will be located at the time of commencement of the action," and that accordingly, the Texas district was not one "where (the action) might have been brought," as required by Section 1404(a).[13]

As was true of the *Jersbek*, the FBL-585 was, at the time this libel was filed, and still is, within the Eastern District of Louisiana where this *in rem* proceeding was filed. The vessel has never returned to Memphis since she was raised and brought to New Orleans, and there is no prospect of her ever returning to the Western District of Tennessee.

The district judge's order transferring this admiralty action *in rem* to that district, accordingly clearly con- [fol. 47] travenes the express requirement of the statute that such a transfer may not be to a district other than one in which the action might have been brought.

The court below apparently concluded that that statutory requirement may be ignored when the vessel proceeded against *in rem* is not actually seized by the marshal.[14]

But claimant-respondent specifically agreed that, in consideration of libelant refraining from having the vessel seized, "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond."

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[13] Broussard v. The Jersbek, 140 FS 851, 852 (SD N.Y. 1956): "The affidavit in opposition to this motion indicates that the S.S. Jersbek is not now in a Texas port and that the ship has not returned to a Texas port since the collision. Therefore, since the ship presently cannot be attached in Texas, an action cannot now be brought in a district court in that state. Furthermore, it does not appear that an action might have been brought in Texas at the time when this action was instituted."

[14] Claimant-respondent made no such contention in the court below, either in its written memorandum or in oral argument. Nor was this position raised by the district court prior to issuance of its *per curiam*.

And the owner of the vessel stipulated that, in lieu of having its vessel physically arrested under the *in rem* process which had issued, it would file claim to the vessel, defend the *in rem* action and pay any judgment which might be rendered against the vessel.[15]

That the vessel was not actually seized is, under these circumstances, of no moment.[16] The undertaking given by [fol. 48] the vessel-owner is, in effect, and for all practical purposes, a release bond.

The stipulation of the parties was consistent with the practice which has been honored in the admiralty for many years. Had this agreement "not been made, process undoubtedly would have been issued (and) the vessel would have been seized."[17]

This court should not be "unmindful of the great importance to the owners of ships that they be not delayed in the prosecution of their business by the issuance of process, where such annoyance can be avoided without prejudice to the rights of litigants, and (it is) quite important that this court should encourage and uphold the practice of its proctors in making agreements to immediately bond vessels upon information from the proctors for libelants that a libel has been filed. Informal as this practice is, its discontinuance would impose intolerable burdens upon the business of transportation in this port."[18]

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[15] Appendix B, Item 2. Claimant-respondent did file its claim to the vessel and its answer to the libel.

[16] See *The Charles C. West*, 1931 AMC 1664 (WD N.Y.), in which the vessel was not arrested under a libel *in rem*, but a bond in lieu of arrest was filed, and the case proceeded to decree in favor of libelant. See also *The New England*, 47 F2d 291, 1931 AMC 407, 411 (SD N.Y.): "A stipulation for value is like any other contract. It is based on a consideration, the release of an arrested vessel or the undertaking not to arrest a vessel against which a claim *in rem* is pending."

[17] *The Agwisun*, 20 F2d 975, 1927 AMC 1084, 1088 (SD N.Y.): "Upon filing the libel, and pursuant to the practice which prevails among shipping interests, the process was not issued but appearances were obtained from the proctors representing the owners that a bond would be filed in the libel proceedings."

[18] *The Agwisun*, 20 F2d 975, 1927 AMC 1084, 1088 (SD N.Y.).

It is submitted that the far-reaching implications of the order of the district court in this case, warrant consideration and correction by this court on appeal.

[fol. 49] Conclusion

The order of the district judge involves a controlling question of construction of the *forum-non-conveniens* statute, a construction which, in contravention of the specific statutory requirement, attempts to confer on another district court, jurisdiction which it does not have.

Immediate appeal from this order, and authoritative determination of the issues presented thereby, will materially advance the ultimate termination of this litigation,[19] and will serve the best interests of the admiralty courts.

It is accordingly respectfully submitted that the appeal for which petitioner prays should be allowed; and that in due course, the matter should be heard as provided in the rules of this court.

Malcolm W. Monroe, Proctor for Petitioner.

Deutsch, Kerrigan & Stiles, Eberhard P. Deutsch, Of Counsel.

October, 1958.

[fol. 50] Appendix A

Forum-Non-Conveniens Statute

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or districts where it might have been brought.

28 USC 1404(a)

[19] The Interlocutory Appeals Act was passed with the view of providing for appeals "in causes relating to the transfer of the action where it is claimed that the transfer is not authorized by law," and that the court to which the cause is transferred "would have had no jurisdiction." See Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, on H. R. 6238, at p. 9; Report No. 1667 of the Committee on the Judiciary, April 29, 1958, at p. 2.

The Interlocutory Appeals Act

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 USC 1292(b)

[fol. 51] APPENDIX B

(Pertinent Parts of Record Below)

Item 1

Stipulation for Taking and Using Depositions

In Re: Sinking of Barge FBL 585 at Memphis, on November 6-7, 1957.

Stipulation

It is stipulated by and between Continental Grain Company and its underwriters, and the Federal Barge Line, Inc., and its underwriters, that the testimony taken may be used in any litigation involving any of the parties concerning the above occurrence, in any United States Court where jurisdiction may exist, to the same extent as if such litigation were now pending, and the witnesses produced by the Continental Grain Company and its underwriters.

It is further stipulated that the depositions are taken as if the Federal Rules of Civil Procedure were applicable, except that all objections, except as to the form of the

question, are reserved to the parties, and signing, sealing and filing are waived.

The cost of the taking of the depositions, including one original and one copy to each of the three interested parties, [fol. 52] will be a taxable cost if litigation ensues, otherwise, the cost will be borne one-third for each interested party.

Item 2

Letter of Undertaking

July 23, 1958

Continental Grain Company
c/o Messrs. Deutsch, Kerrigan & Stiles
1800 Hibernia Bank Building
New Orleans, Louisiana

Re: Continental Grain Company
vs Federal Barge Lines, Inc.
and Barge FBL 585
No. 3656 in Adm., E.D. La.

Gentlemen:

In consideration of your not having seized, under the *in rem* process which has been issued in the captioned action, our Barge FBL 585, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of the United States District Court for the Eastern District of Louisiana; and in further consideration of our not being required to post the usual bond for the release of that vessel,

We agree that we shall, within the delays allowed by law and/or the rules of court, file claim to Barge FBL 585, and pleadings in the above-entitled and numbered action; and that, vessel lost or not lost, we shall pay any final decree which may be rendered against said vessel in said proceeding.

[fol. 53] It is the intent of this undertaking that the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact,

been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond, we, as claimant, reserving in behalf of the vessel all other objections and defenses otherwise available except those which might be predicated upon the fact that the vessel was not actually so seized.

Very truly yours,

FEDERAL BARGE LINES, INC.

By /s/ Noble C. Parsonage
NOBLE C. PARSONAGE
Vice President-Treasurer

Item 3

Claim

(Heading and Affidavit Omitted)

Comes now Federal Barge Lines, Inc., through its proctors of record, Lemle & Kelleher, and shows that it is the sole and only owner of the Barge FBL 585, proceeded against herein, and claims the said barge as owner and prays that it be permitted to defend according to law.

New Orleans, Louisiana, July , 1958.

/s/ Lemle & Kelleher

Proctors for Federal Barge Lines, Inc.

[fol. 54]

Item 4

Motion to Transfer Cause

(Heading Omitted)

Now comes Federal Barge Lines Inc. and move the Court for an order transferring this action to the United States District Court for the Western District of Tennessee, Western Division, on the ground that such transfer is necessary for the convenience of the parties and witnesses and in the

interest of justice as will appear from the affidavit attached hereto and made part hereof.

CHARLES KOHLMEYER, JR.
1836 National Bank of Commerce Building, New Orleans, La.

Item 5

Minute Entry, Wright, J.,

October 16, 1958

This matter came on for hearing on respondent's motion to transfer this case to the United States District Court for the Western District of Tennessee under 28 U.S.C. Sec. 1404(a).

Present: Malcolm Monroe, Esq.
Proctor for Libellant

Charles Kohlmeyer, Jr., Esq.
Proctor for Respondent

[fol. 55] The Court, having heard the argument of counsel and studied the briefs submitted in support thereof, is now ready to rule.

It Is Ordered that this case be, and the same is hereby, transferred to the United States Court for the Western District of Tennessee.

It Is Certified that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

Per Curiam

The damage to the cargo in suit occurred in Memphis when the barge into which it was being loaded at libelant's grain elevator sank. The barge, owned by respondent herein, was also damaged. That damage is the subject of a suit between these parties now pending in the Western

Division of Tennessee. Most of the witnesses to the sinking reside in Memphis. Although the case pending in Memphis will be tried to a jury, the issue therein, that is, the cause of the casualty, is precisely the issue in the case at bar. The convenience of the great majority of witnesses in this case dictates that this case be tried in Memphis. The efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim [fol. 56] for hull damage, both claims being between the same parties, and relate to the same incident.[1]

The libel is in rem as to the Barge FBL-585. While this libel could have been originally brought in the Western District of Tennessee against the respondent, Federal Barge Lines, the owner of the barge, the libel as to the barge itself would ordinarily be restricted to the place where the barge is located at the time the libel is filed.[2] At that time, and now, the barge is located in this district. However, since the barge was neither seized by the Marshal nor bonded by respondent, libelant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by, for the reasons above stated, transferring this case to the Western District of Tennessee. Since this order to transfer does involve a serious question of law under 28 U.S.C. Sec. 1404(a), that is, the right to transfer the case as against the barge to the Western District of Tennessee,[3]

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[1] Since the suit in the Western District of Tennessee was filed before the one here, it may be that the defendant there, the libellant here, is required to counterclaim in that action for its cargo damage. See Rule 13 (a) Fed. R. Civ. P. Moreover, since the case there is to be tried on the merits on November 19, 1958, a final judgment rendered therein may bar further prosecution of the suit here under the principle of collateral estoppel. See Restatement, Judgments Sec. 58c.

[2] Clinton Foods v. United States, 4 Cir., 188 F. 2d 289; Broussard v. The Jersbek, 140 F. Supp. 851; New Jersey Barging Corp. v. T.A.D. Jones & Company, 135 F. Supp. 97; United States v. 11 Cases, etc., 94 F. Supp. 925.

[3] See Deepwater Exploration Company, et al v. Andrew Weir Insurance Co., Ltd., et al., D.C., EDLa., October 3, 1958, F. Supp. , and cases cited in No. 2.

this Court has certified this order for appeal under 28 U.S.C. Sec. 1292(b).

[fol. 57]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17499

[Title omitted]

ORDER ALLOWING APPEAL FROM INTERLOCUTORY ORDER—
November 10, 1958

Before TUTTLE, JONES and BROWN, Circuit Judges.

Per Curiam:

It appearing that application for permission to appeal from the Order of the District Court entered on October 16, 1958, has been timely made, and the Court concluding that an immediate appeal may materially advance the ultimate termination of the litigation, permission to take the appeal is hereby allowed.

[fol. 58] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—March 31, 1959 (omitted in printing).

[fol. 59]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17499

CONTINENTAL GRAIN COMPANY, Appellant,

versus

FEDERAL BARGE LINES, INC., and BARGE FBL-585, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

OPINION—June 30, 1959

Before HUTCHESON, Chief Judge, and BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: May an *in rem* admiralty proceeding upon application of a willing Claimant be transferred under Section 1404(a), 28 USCA, to a district in which the original *res* is not located?

[fol. 60] That is the question presented by this interlocutory appeal, certified by the District Judge and subsequently accepted by us. 28 USCA §1292(b). Preliminary to the main problem we are of the view that the interlocutory appeal statute enacted by adding paragraph (b) to former 28 USCA §1292 applies to an order certified as dispositive in an admiralty cause.[1] The amendment, to be sure, refers to "a civil action." And since interlocutory appeals were allowed in admiralty from decrees determining rights and liabilities in patent suits finding infringement and certain injunctions, 28 USCA §1292(a)(3)(4)(1), it might be argued that the use of "a civil action" by Congress was a purposeful one to exclude admiralty causes already covered in part. But we see no such limited purpose. We think the term was used in the broad sense to distinguish between criminal litigation on the one hand, and all others.

[1] The new portion, found in paragraph (b), was added by 72 Stat. 1770 (September 2, 1958):

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." 28 USCA §1292(b) (1958 Supp.). For a recent discussion of this Act and its operation see Wright, The Interlocutory Appeals Act of 1958, 23 F.R.D. 199 (1959), to be reprinted in 1 Barron, Holtzoff & Wright, Federal Practice and Procedure §58.1 (1950).

This accords with the broad nature of orders encompassed [fol. 61] by the new interlocutory appeals amendment. Its own words indicate as well that it is to broaden, not restrict, appealability as it refers to "an order not otherwise appealable under this section." Unlike the former situations of decree fixing rights and liabilities in admiralty or for patent infringement, or injunction, the new act recognizes that there may be problems—perhaps of procedure, or substance, or evidence—in a given case, the decision of which, one way or the other, will effectually dispose of the litigation without the necessity of going through a trial leading to the type of orders already covered under the old Act. Congress meant to put all civil litigation, without regard to its historical divisions of law, equity, or admiralty, within reach of the new Act.

On the merits, the case may be briefly stated. On July 2, 1958, Continental Grain Company filed in the Eastern District of Louisiana a libel *in rem* against the Barge FBL-585 then in the Port of New Orleans, for damage to a cargo of soybeans resulting from the sinking of that barge in the Wolf River at Memphis, Tennessee. This was joined with an *in personam* action against Federal Barge Lines. Scarcely a week before, Federal Barge Lines, Inc. through other counsel had filed a civil suit in the Tennessee State Court against Continental Grain Company for damage sustained by Barge FBL-585 as a result of this very same sinking, allegedly caused by negligence of Continental in its loading and care of the barge. That case was removed and was pending for trial in the United States District Court for the Western District of Tennessee at Memphis. [fol. 62] The common issue in both cases, broadly stated,

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How the left hand knew nought of the right in this multi-state, multi-forum amphibious litigation is explained in the briefs. The underwriters on Federal's hull loss and cargo liability, as were those on Continental's cargo loss and its public liability, were different. Each was apparently anxious to manage its own litigation with a seeming indifference to the strong likelihood that under FR Civ.P. 13(a) concerning compulsory counterclaims, or general principles of estoppel by judgment, res judicata, or the like, trial of one case would inevitably affect, if not control, the other. See Gilmore & Black, Admiralty 507-08 (1957); and generally 1 Barron & Holtzoff, Federal Practice and Procedure §394 (1950, and Wright

was whether Barge FBL-585 sank as a result of unseaworthiness or negligent loading.

On the filing of the libel, FBL-585 was not actually seized. In accordance with the practice in New Orleans and all major seaports of maritime litigation, the usual letter of undertaking was given by Federal, providing that in consideration of the Barge not being seized and released on bond Federal would "file claim to Barge FBL-585, and pleadings" and "that, vessel lost or not lost [would] pay any final decree which may be rendered against said vessel in said proceedings." The District Court, in granting Federal's motion under Section 1404(a) to transfer the admiralty cause to Memphis because of the presence of witnesses, the convenience of parties and the pendency of the litigation there, apparently gave some significance to the fact that there had been no actual seizure of the Barge. The parties are at one that fair application of the letter under-[fol. 63] taking and particularly the Non-Waiver of Rights Clause[3] requires that we treat it as though, upon the libel being filed, the vessel had actually been seized, a Claim filed, a stipulation to abide decree[4] with sureties executed

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Supp. 1958). The Memphis case was apparently tried, but we have been kept discreetly in the dark as to its outcome. In view of our holding the Court in Tennessee may now have to deal with these problems but wholly unaffected by intimations one way or the other from us.

[3] The undertaking expressly stated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond."

[4] Our reference to the stipulation releasing the vessel in the SS Monrosa, 5 Cir., 1958, 254 F.2d 297, AMC , cert. dismissed, 1959, U.S. , S.Ct. , 3 L.Ed.2d 723, is somewhat misleading. It is not, as some might think impliedly suggested, a consent appearance or a special agreement of the type lawyers generally refer to as a stipulation in a case. The term stipulation to abide decree is the traditional name given to what others would call a surety bond. Its name derives from the undertaking spelled out in the bond "the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of said claimant

and filed by Claimant, and the vessel formally released. Any other course would imperil the desirable avoidance of needless cost, time, and inconvenience to litigants, counsel, ships, Clerks, Marshals, Keepers and court personnel through the ready acceptance of such letter undertakings. The Agwisun, S.D.N.Y., 1927, 20 F.2d 975, 1927 AMC 1084, 1088.

Continental's opposition to the transfer is not that the admiralty nature of the proceeding somehow sets up its own moat to prevent a Section 1404 transfer. Rather its contention rests on the terms of that Section, which permit transfer "to any other district or division where it might have been brought." §1404(a).

[fol. 64] Since a libel *in rem* requires a *res* and the *res*, at the time of this libel and at the time of transfer, was in New Orleans, not Memphis, the terms of the statute were not met. And, it is further argued, the statute must be read literally since some courts have pointed out that, like a *forum non conveniens* situation, in all cases in which Section 1404 comes into play it presupposes at least two forums in which the defendant is amenable to process. See the full review of this in *Blaski* v. *Hoffman*, 7 Cir., 1958, 260 F.2d 317, now pending on certiorari, ... U.S. ....., ... S.Ct. ....., 3 L.Ed.2d 570. But we have not so read the Act. To its literal terms we have, with others, recognized what seems to be to us the obvious implication that a cause may, on proper showing, be transferred to another district to which the movant consents to an unlimited submission of the cause even though it could not have been filed there initially. Ex Parte Blaski, 5 Cir., 1957, 245 F. 2d 737.

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or its surety, execution may issue against their goods, etc." 2 Benedict, Admiralty, §§363, 368 (6th ed. 1940). Some of the various forms of the districts are set forth at 595-600. The General Admiralty Rules mention stipulations in Rules 4, 5, 11, 12, 24 and 51, 28 USCA. Gilmore & Black, Admiralty 650 (1957).

[5] The *Blaski* litigation is still on its odyssey. A patent suit was filed in the Northern District of Texas and defendant, a resident of Texas, moved for transfer to the Northern District of Illinois where the validity of the same patent was involved in extended pending litigation. We denied leave to file mandamus to prevent

Even to the most ardent admiralty purist, the result presents no real or conceptual difficulties. The Court does [fol. 65] not undertake to transfer the *res*, nor does it even attempt to transfer the cause while the *res* is still in custody of the Court. Before the transfer can be made, a Claim must have been filed and the vessel released under bond (stipulation). Once that is done, the lien on the vessel is discharged for all purposes, ceases to exist, and the release of libel bond is the sole security.[6] Traditional notions are not affected if that security floats with the cause wherever the law navigates it.

Nor does this alter in any way the characteristics of the libel *in rem*, or the historical, actual, or supposed nature of the liability of the ship as the thing. See Gilmore & Black, Admiralty 483-510 (1957). The libel begins as one *in rem*. It retains that status until the final decree, regardless of the place it pends. If as a libel *in rem* it has advantages or disadvantages, procedural or substantive, they follow the proceeding regardless of geography. And, of course, in ordering a transfer upon the application and consent of the Claimant, the "conferring" of jurisdiction upon the transferee court over a cause which would never have come its way had it been essential that the vessel be within its territory is no different than the time-honored practice in the initial

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the transfer. Ex Parte Blaski, 5 Cir., 1957, 245 F.2d 737. When it got to Chicago, the District Judge accepted it, although reluctantly. The Court of Appeals for the Seventh Circuit, after first approving the transfer, later changed its views and granted mandamus to prevent the Judge accepting the transfer ordered out of this Circuit. Blaski v. Hoffman, 7 Cir., 1958, 260 F.2d 347. Like the man without a country, this litigation has been expatriated from Texas; it has been denied admission to Illinois. To solve this impasse was presumably what led the Court to grant certiorari, ... U.S. ....., ... S.Ct. ....., 3 L.Ed.2d 570. That decision could, of course, undo our action.

[6] See Judge Woolsey's full discussion of this in The New England (J. K. Welding Co. v. Gotham Marine Corp.) S.D.N.Y., 1931, 47 F.2d 332, 1931 AMC 407: "The stipulation for value is a complete substitute for the res, and the stipulation for value alone is sufficient to give jurisdiction to a court because its legal effect is the same as the presence of the res in the court's custody • • •." 47 F.2d at 335. See also Gilmore & Black, Admiralty 650-51 (1957).

filing of libels *in rem*. The subject matter being within the Court's jurisdiction, the parties and the cause being real and justiciable, a party or thing may submit to a particular [fol. 66] court. And whether thought of in terms of waiver or consent, it is, as every proctor knows, done on a very large scale. 2 Benedict, Admiralty 78 (6th ed. 1940); The Providence, D.R.I., 1923, 293 Fed. 595; The New England, see note 6, *supra;* and Yozgat (*P. Diacon-Zadeh* v. *Devlet Denizyollari*), E.D.Pa., 1954, 127 F.Supp. 446, 1954 AMC 2146.

We are not dealing with a coercive transfer, neither sought nor consented to by the Claimant. *Broussard* v. *The Jersbek*, S.D.N.Y., 1956, 140 F.Supp. 851, 1956 AMC 1575. We deal here only with a voluntary request seeking and consenting to the transfer. We join others in recognizing that this may be done. *Torres* v. *Walsh*, 2 Cir., 1955, 221 F.2d 319, 1955 AMC 1181, cert. denied, 350 U.S. 836, 76 S.Ct. 72, 100 L.Ed. 746; *Andino* v. *The S.S. Claiborne*, S.D. N.Y., 1957, 148 F.Supp. 701, 1957 AMC 526; *May* v. *The Steel Navigator*, S.D.N.Y., 1957, 152 F.Supp. 254, 1957 AMC 1832.

As we find the transfer within the power of the District Court, we need only state as to the propriety of the exercise of that power that we find no basis for concluding that the Judge abused his discretion. The rule announced in Ex Parte Charles Pfizer & Co., 5 Cir., 1955, 225 F.2d 720, is applicable and controlling.

Affirmed.

[fol. 67]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONTINENTAL GRAIN COMPANY,

No. 17499. versus

FEDERAL BARGE LINES, INC., and BARGE FBL-585.

JUDGMENT—June 30, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 68]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 17,499

[Title omitted]

MOTION FOR STAY OF MANDATE—Filed July 6, 1959

On suggesting to the court that appellant intends seasonably to seek certiorari from the Supreme Court of the United States herein, appellant respectfully moves the court to stay issuance of its mandate herein for sixty days pending application for, and thereafter disposition of the petition for, certiorari.

Malcolm W. Monroe of Deutsch, Kerrigan & Stiles,
Proctor for Appellant.

New Orleans, July 6, 1959.

Certificate of Service (omitted in printing).

[fol. 69]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,499

[Title omitted]

ORDER STAYING MANDATE—July 9, 1959

On Consideration of the Application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of 60 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 60 days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 60 days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 9th day of July, 1959.

John R. Brown, United States Circuit Judge.

[fol. 70] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 71]

SUPREME COURT OF THE UNITED STATES

No. 229, October Term, 1959

CONTINENTAL GRAIN COMPANY, Petitioner,

vs.

BARGE FBL-585, et al.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 26.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.